IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT

JODHPUR

O R D E R

Shree Cement Ltd. **VS**. U.O.I. & Ors.

D.B. CIVIL WRIT PETITION NO.1611/2004
under Article 226 & 227 of the
Constitution of India.

Date of order : 6th March, 2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE R.P. VYAS

Mr. Rajendra Mehta for the petitioner.

Mr. Ravi Bhansali for the respondents.

BY THE COURT:- (Per Hon'ble Mr. Rajesh Balia, J.)

We have heard learned counsel for the parties.

The facts giving rise to this writ petition are that the order dated 8.11.1995 was passed by the Assistant Commissioner, Central Excise disallowing the modvat credit on various capital good stated in the order inter alia

on the grounds that the said capital goods are not used for producing or processing of any goods or bringing about any change in substance for manufacture of final product, therefore, the modvat credit on the aforesaid capital goods is not admissible under Rule 57Q of the Central Excise Rules, 1944. This disallowing related to the capital goods invoiced to the assessee during the period between 7.8.1995 to 17.10.1995 under different declarations, but were actually received later on.

It may be noticed that as per Rule 57T(i), the declaration in relation to capital goods for claiming modvat credit in respect thereof has to be made ordinarily before the goods are actually received and the modvat credit can be claimed on actual receipt of such goods in respect of which declarations have been filed. Thus, the order dated 8.11.1995 was to pre empt the claim to modvat credit in respect of such goods covered by invoices regarding which declarations were filed, as and when such goods were to be received by the petitioner.

The order Annex.1 dated 8.11.1995 was subjected to appeal before the Commissioner of Central

Excise (Appeal), who by his order dated 27.5.1997 in appeal No.91-CE/JPR/97 allowed the appeal on two fold grounds. Firstly, it was held that since no show cause notice was issued and secondly that the impugned order itself is not an speaking order, it would be in the fitness of things to out rightly reject the legal sanctity of the order dated 8.11.1995. Apart from this, the learned Commissioner (Appeals) further observed that:-

> "Since it is not clear whether the issue is one time issue or a recurring one and also because it could have all India repercussions, I find myself compelled to examine in detail the grounds of appeal given in the appeal of the appellant. The column 'application' as given in para C(ii) has clearly outlined the role of each of these 14 items. In doing so I find that all the details which have been described in this column in fact indicates that all these individual items are used for producing or processing of any goods or bringing about any change in substance for the manufacture of final product."

This order was subjected to appeal by the Department before the Customs Excise and Gold (Control)

Appellate Tribunal (CEGAT), as it was named at the relevant time. Noticing the aforesaid two grounds on which the appeal was allowed by the Commissioner (Appeals), the Tribunal agreed with the appellate order and found that the Commissioner (Appeals) was right in observing that the Assistant Commissioner was not just and right in proceeding to pass an order in absence of show cause notice and on this issue alone, the appeal of the Revenue was liable to be rejected. The Tribunal further observed that in view of the aforesaid view, he did not find it necessary to go into other issues and accordingly, the appeal filed by the Revenue was dismissed. The order was made on 16.7.1999 (21.7.1999).

Thereafter the Revenue moved a rectification application dated 9.5.2000 requesting Tribunal to decide the other questions relating to the merit of the availability of the modvat credit on 14 items listed in the order of the Assessing Officer in view of recurring nature of the issue.

Vide Annex.14 dated 22nd September, 2000 rectification application was dismissed on the ground that neither the mistake has crept in the order nor the mistake

is apparent on record to be rectified. In coming to this conclusion, while reiterating its view expressed in the appellate order that the department cannot raise demand without issuing show cause notice, it also observed that every assessment is separate and distinct and depending upon the facts and circumstances of the case, the department may initiate proceedings by issuing show cause notice.

That was the end of journey of the order passed by the Assessing Officer on 8.11.1995.

The other facts relevant for the present purposes are that after the Commissioner (Appeals) had passed the order, as noticed above, on 27.5.1997, a show cause notice Annex.8 was issued on 1.1.1998 alleging that the assessee has wrongly taken the modvat credit for Rs.85,71,818/- during June 1997. This modvat credit related to, as per show cause notice, in respect of excisable goods namely, Buldozer, Hindustan 2021 Loader, Hyd. Excavator, all falling under subheading 8429.00 and Hindustan 1035 dumper falling under subheading 8704.00 of the Schedule to the Central Excise Tariff Act 1985, which were received

by them during 28.10.1995 to 31.7.1996 under the declaration subject matter of earlier order dt.8.11.1995.

The reason stated for the show cause notice was that all these goods are used by the assessee in their mines situated outside the factory premises for excavating, crushing and transporting of raw material and these items are neither used in the assessees' factory for producing or processing of any goods nor for bringing about any change in any substance for the manufacture of final product. It was also alleged in the show cause notice that the goods falling under heading 84.29 and 87.04 are not covered under the definition of capital goods as per explanation-1 Rule 57Q-(1) of the Central Excise Rules, 1944.

It appears that the assessee in the first instance challenged the show cause notice through D.B. Civil Writ Petition No.2583/2003 inter alia on the ground that matter is covered by the decision of the Appellate Authority dated 27.1.1997. Since during the pendency of the writ petition, the Revenue has challenged the order of Commissioner (Appeals) before the Tribunal and the matter was subjudice, the petitioner sought permission to withdraw the

writ petition at that stage. The said permission was granted and the petition was dismissed as withdrawn on 10.8.1998.

In pursuance of show cause notice dated 1.1.1998, no action was taken for a considerable long period, though the hearing was fixed for 19.4.2000 vide Annex.15 dated 28th March, 2000. Vide reply Annex.16 by drawing the attention towards Tribunal's order dismissing the appeal of the Revenue and pointing out that the order of the Commissioner (Appeals) has not been set aside, therefore, it subsists on merit and to the fact the matter in issue is also subjudice in High Court of Andhra Pradesh, it was emphasised that since the issue of captioned the show cause notice has already been settled by the higher Appellate Authority, this was binding on the department.

After the reply was submitted by the Assessee vide Annex.16, no further proceedings took place until the notice dated 4.3.2004 was received by the assessee by which the hearing of a number of show cause notices including notice dated 1.1.1998 also as one of the previous show cause notices sought to be resurrected.

This led to filing of the present writ petition which was admitted on 19.4.2004 and an interim order was passed staying further proceedings in pursuance of notice dated 30th March, 2004. Said interim order was modified later on by restricting the interim order by staying further proceedings only in respect of show cause notice No.1 dated 1.1.1998 and proceedings in pursuance of other show cause notices were allowed to be continued.

At the time of admission, the principal contention urged before us was about the availability of the modvat credit in respect of goods in question had been affirmed by the CIT (Appeals) vide his order dated 27.5.1997 which order has been affirmed in appeal by the Tribunal and no part of it has been set aside. The modvat credit in question has been availed in respect of indents received between August 1995 to October 1995 later on when goods were actually received. However, when the Assistant Collector has passed the order goods have not been received. He in fact prohibited the petitioner from availing Modvat Credit in respect of goods for which declaration had been filed before receipt of goods by the

assessee, as per requirement of Rule 57T and which order was set aside by the Commissioner (appeal) vide order dt.27.5.1997. That being binding the show cause notice for recalling the same cannot be issued for initiating the said proceedings.

It was also urged on merit that capital goods in question are used by the assessee in its captive mines, mineral from which it is exclusively used by the petitioner in its factory for manufacture of end product and the raw mineral excavated from mine is not sold to other parties. On this premise, it was contended that such captive mines are part of factory and capital goods used at such captive mines are eligible for availing modvat credit of Duty paid on such capital goods.

The Supreme Court in M/s J.K. Udaipur Udyog Ltd.'s case reported in **2004(7) SCC 344** had held against the assessee and had found that the modvat credit on capital goods used at mine are not the goods used in factory and, therefore, the condition of availing modvat credit in respect of Section 57Q is not fulfilled.

However, it has also been pointed out by the assessee that the correctness of the said judgment of M/s J.K. Udaipur Udyog Ltd. has since been doubted in a subsequent decision in M/s Vikram Cement Vs. CCE **2005 (7) JT 637.**

Vikram Cement's case has since been decided by Apex Court, firstly by holding that the interpretation about the inputs to be used in factory premises as stated in M/s.J.K. Udaipur's case (Supra) to be erroneous and it was held that the inputs used in mining operations are eligible for availing Modvat Credit in respect of duty paid on such inputs in Vikram Cement vs. Commissioner of Central Excise reported in 2006 (194) ELT 3.

The ratio of that decision has been extended to capital goods used at captive mines. In the later decision in M/s Vikram Cement vs. Commissioner of Central Excise, Indore decided on February 16, 2006 in which the Court noticed that the only issue before it is with regard to eligibility of Modvat/Cenvat Credit on inputs and capital goods used in mines and answered the question in following manner:-

> "In so far as the Modvat/Cenvat credit on inputs (explosive,lubricating oils etc.) is concerned, the matter is squarely covered by the decision of this court in the case of Vikram Cement vs. CCE reported in 2006 (194) ELT 3. Therefore, the appeals where credit on inputs is concerned, are allowed.
>
> As regards the Modvat/Cenvat Credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee. On the other hand, if the mines are not captive mines but they supply to various other cement companies of different assessees, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."

Thus captive mines were considered integrated part of factory, if the mineral excavated is exclusively used in manufacture of concerned commodity in factory.

In the present case also, same issue has arisen and as the petitioner has approached only against show cause notice, such objection to show cause notice can also be raised before the original authority.

In view of the authoritative pronouncement on the question of law on the merit of ground stated in show cause notice, we need not enter into the merits of the other contentions raised and dispose of this petition by directing the petitioner to appear before the original authority and raise all contentions including the one referred as above. The original authority is to decide such contentions in accordance with the law laid down by the Supreme Court, as noticed above.

[R.P. VYAS], J. [RAJESH BALIA], J.

babulal/